

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2011040874

DECISION

Deborah Myers-Cregar, Administrative Law Judge, Office of Administrative Hearings (OAH), heard this matter on September 27, 2011, in Van Nuys, California.

Student's parents (Parents) represented Student. Patrick Balucan, Attorney at Law, represented the Los Angeles Unified School District (District). Dorene Rubin, Due Process Specialist, attended on behalf of District.

Student filed a Request for Due Process Hearing on April 22, 2011. OAH reset all timelines effective June 13, 2011, because Parents had not participated in the mandatory resolution session.

On September 27, 2011, at the close of hearing, Parents presented an oral closing argument. District was granted permission to file written closing argument by October 7, 2011 at 5:00 p.m. District timely filed its closing brief. The matter was then submitted and the record was closed.

ISSUE

Whether District denied Student a free appropriate public education (FAPE) in his February 3, 2011 individual education plan (IEP) by offering 240 minutes per month of speech and language services?

FACTUAL FINDINGS

1. Student is a four-year-old boy who lives with Parents. At all relevant times, he lived within District's jurisdictional boundaries.

2. At 11 months of age, Student began receiving Early Start services through North Los Angeles Regional Center (NLARC). As Student approached his third birthday, NLARC referred Student to District to determine Student's eligibility for special education, placement, and related services. At age two years and 11 months, District conducted initial psycho-educational, occupational therapy, and speech and language assessments.¹

3. District's school psychologist, Robin Kissinger, conducted a psycho-educational assessment of Student on January 25, 2010. She prepared a written report documenting her results. She reviewed NLARC's service plan, occupational therapy, physical therapy, developmental, and speech and language assessments. Kissinger conducted the Preschool Team Assessment-Experimental III (PTA III), the Developmental Profile III (DP3), the Childhood Autism Rating Scale (CARS), interviewed Parents, and documented her own observations. Test results established Student had average cognitive function, and significant delays in communication, receptive and expressive language, pre-academic skills, social emotional development, motor skills and self-help skills. Student obtained an overall score of 34 on the CARS, placing him in the mild-moderate autistic range. Kissinger recommended Student become eligible for special education services under the category of autistic like behaviors, which included difficulties in communication and social interaction, as well as the display of stereotypic behaviors, that impacted Student's ability to access the general curriculum.

4. District's speech and language pathologist, Loretta Wolgat, conducted an assessment on January 29, 2010. Wolgat earned a master's degree in communication disorders from California State University, Northridge in 1980. She was licensed as a speech and language pathologist by the State of California, and was certificated by the American Speech and Hearing Association. Wolgat had 32 years experience as a District speech pathologist

5. Wolgat conducted the assessment in English, Student's native language. Wolgat reviewed Student's Early Start records, and NLARC's speech and language assessments, progress reports, and closing reports from September 30, 2008 through January 14, 2010. The records showed that Student received speech therapy twice per week for an unspecified amount of time through NLARC. Wolgat observed Student in her office for the evaluation, although she could not recall the length of her observation. Student demonstrated highly self-directed activities, which meant he did not follow adult directions. Student did not stay seated during the evaluation, and he explored the room for his preferred play toys.

¹ District's occupational therapy assessment is not part of the record, as it is not a contested service.

He played with a familiar adult for one to two minutes. Student did not speak, with the exception of the word “mama,” and used American Sign Language to express “more.” Student used non-verbal strategies to communicate his needs, by pointing and leading Parents. He responded to Parent’s request to “clean up.”

6. Wolgat conducted the Preschool Language Scale-4th Edition (PLS-4). Student’s scores fell in the first percentile for auditory comprehension, expressive comprehension and total composite scores. Because Student only said “mama,” Wolgat could not take a language sample of 50 words. He did not imitate or spontaneously produce any sounds, syllables or words.

7. Based on her observations and Parent interviews, Wolgat believed the assessment results were a valid indicator of Student’s performance. Wolgat concluded that Student’s communication deficits impeded his ability to effectively access a pre-school classroom curriculum, and found him eligible for special education under the category of speech and language impairment. However, she determined that Student did not demonstrate significant difficulty understanding or using spoken language to such an extent that it adversely affected his educational performance, and determined that he was able to benefit from their special education program without speech and language related services.

8. At hearing, Wolgat explained she based her seemingly inconsistent conclusions on the fact that Student needed a special education class with a teacher trained in building communication, before he could effectively receive direct speech therapy. Wolgat believed that in many ways, a special education teacher may have better training than a speech pathologist, because of that teacher’s specialty in autism. Language development occurred 24 hours a day, seven days a week. Student’s communication could be developed by anyone who engaged him, not just by speech pathologists. At the time of Wolgat’s evaluation, Student could not sustain attention for longer than one minute, had no intent to communicate, did not point or make eye contact, and was non-verbal. Wolgat determined that because Student could not sit still, he would not be able to pay attention in therapy, or benefit from therapy. Student’s development was not at the level of adult-directed activities, but at a level of self-directed activities, which meant he could not follow adult instructions and requests. Wolgat explained that Student could not benefit from a service before he was at a corresponding global developmental level. Wolgat determined that Student required specified instruction so he could learn how to follow a routine. For that reason, Wolgat believed Student needed instruction in a language-based autism special day class, rather than the related service of speech and language therapy. Student required instruction from a teacher who was a specialist in autism. The autism teacher could help build Student’s communication skills, as well as attend to his developmental needs. The whole purpose of the language based autism program was to develop language in a classroom.

9. On February 4, 2010, the IEP team met for Student’s initial IEP. The attendees included Student’s mother, the school psychologist and administrative designee, the occupational therapist, a special education teacher and a general education teacher. The team discussed the assessment results, and determined Student was eligible for special

education under the category of Autism, and should receive related services in the areas of occupational therapy and speech and language. The IEP team developed annual goals, including “Annual Goal # 6,” which addressed listening and speaking performance. The goal required that Student would answer simple questions with words, gestures or signs, four times per school day. The IEP team planned that initially, Student would answer simple “yes” or “no” questions with words, gestures or signs with adult assistance four times per school day, and then progress to do so without adult assistance.

10. The IEP team also developed “Annual Goal #7,” which addressed speech and language. Specifically, that goal required that Student would use simple two to three word phrases to express his wants, needs, and ideas, four times per school day. The team anticipated that Student would use single words, approximate words and sounds, or use an alternative communication device to express his wants and needs four times per school day. Student would also progress to repeating simple two to three word phrases after an adult model, to express his wants, needs, and ideas four times per school day.

11. District offered Student placement in a language-based autism class for 1000 minutes per week. The special day class provided Student with a smaller class size and a specialized program designed to develop his deficient skills. District also offered 90 minutes of speech and language consultation per month with Student’s teacher, as well as accommodations such as prompts and cues for engagement in group games, redirection and refocusing for directed tasks, preparation and warning for transition, visual cues paired with verbal directives, and frequent sensory motor breaks. District also offered Student adaptations in the form of visual support and augmentative communication.

12. Parents agreed to the District’s offer of placement and services, and consented to the IEP. Parents did not enroll Student in the program until May 2010, three months after the February 4, 2010 IEP meeting. Student attended the same class during the 2010-2011 school year.

13. In May 2010, District speech pathologist, Karynne Ruiz, began providing Student with 90 minutes per month of direct consult speech therapy. At hearing, Ruiz explained how she consulted and collaborated with Student’s special day class teacher, as well as provided Student with direct small group therapy with another child in the session. Ruiz used play techniques to engage Student, including the use of picture cards to request a desired activity, verbal prompts, and modeling. At first, Student demonstrated variegated babbling, and combined vowels and consonants. By February 2011, Student demonstrated improvement, as Student could model and approximate sounds, as well as communicate intent. Student could also use non-verbal cues. However, he was still difficult to understand.

14. On February 3, 2011, the IEP team convened for the annual review of Student’s progress, placement, goals, services and supports. The IEP team members included Parents, District administrator Mary Richardson, Student’s special education teacher Deborah Palacio-Maguire, Student’s speech and language provider Karynne Ruiz, and Student’s occupational therapy provider Nevajoy Orr. A general education teacher,

Luisa Chavez, appeared on the roster but did not sign in. There was no evidence she did not attend the IEP meeting in spite of the lack of her signature. Student's SDC teacher entered the notes into the IEP.

15. The IEP team discussed how Student met all of his annual goals with the exception of his three annual speech and language objectives, and his annual occupational therapy motor goal. Student needed more time to reach these goals, because he required verbal prompting and adult modeling in these areas of need. The IEP team also discussed Student's language development performance area. Specifically, the team noted that Student communicated his needs by pointing to objects and shaking his head. Also, Student attempted to repeat words, babbled to communicate, imitated songs and rhymes during circle time, and used sign language at the teacher's request. However, Student had difficulty expressing his needs and wants with intelligible words.

16. The IEP team then revised his speech and language goals. "Annual Goal #3," in the language performance area, required that Student would answer simple questions with one or two words, four times per school day. The team anticipated that Student would answer "yes" or "no" questions with words, gestures or signs, four times per school day, and then progress to answering simple questions with one or two words after an adult model, four times per school day. "Annual Goal #6," in the communication performance area, required that Student would repeat simple two or three word phrases after an adult model to express his wants, needs and ideas five times per school day. The team anticipated that Student would imitate 10 or more single words to express wants, needs or ideas on four occasions per school day, and then progress to imitating 20 or more single words to express his wants, needs and ideas four times per school day.

17. To address these areas of continued need, District offered continued placement in the language-based autism special day class, 1000 minutes per week. District also offered, pursuant to the speech provider's recommendation, to increase Student's speech and language therapy to 240 minutes per month, to be delivered as a direct collaborative service between one and five times weekly. The direct collaborative service meant that Student's teacher and speech pathologist would interact to support his goals. Additionally, the speech pathologist would continue to work with Student with one other child.

18. Parents agreed to District's offer of placement. However, they did not agree to the District's offer of 240 minutes per month of direct collaborative speech and language services, because they believed Student required three hours per week of individual speech therapy to address his unique needs. Parents expressed that Student continued to have difficulty communicating his needs and being understood. Consequently, Student would become frustrated, throw tantrums and bang his head. Parents based their opinion on the fact that Student did not meet his annual language goals. They did not provide expert testimony or assessments which supported their contention that Student required three hours per week of individual speech therapy to receive educational benefit.

19. Deborah Palacio-Maguire, Student's special day class teacher, explained her autism program at hearing. Maguire held a master's degree in early childhood special education, and held a clear credential, an early childhood special education credential, and a bilingual CLAD credential. Maguire had worked as a special education teacher for the District for eight years. Student attended her special day class preschool autism program from May 2010, through the time of hearing. Maguire developed Student's language goal in his February 3, 2011 IEP. There were nine students, Maguire and two assistants in the classroom, with a ratio of three students to one adult. With the smaller class size, Maguire felt better able to attend to Student's needs. Maguire opined that Student's placement in her class was appropriate, because her language-based autism program taught students how to communicate and use language. In Student's case, Maguire purposefully elicited communication in his daily school activities, such as by helping him interact with two to three other students almost continuously, and by prompting him to verbally request items. Maguire also regularly consulted with Ruiz about Student's speech development, and asked Ruiz for strategies to help Student articulate sounds and words. As a result, Student's communication progressed, and he articulated more sounds and words. Student also initiated asking for preferred items, as well as asking for "more of" an item.

20. Maguire opined that Student's group speech therapy sessions were appropriate. While Maguire believed Student could possibly benefit from a greater amount of speech therapy, such as the three hours per week of individual therapy that Parents suggested, she would be concerned that Student would lose valuable time being removed from her language-based program for such an extended period of time. Maguire opined that Student was only 25 percent along in the process of his speech and language development. Maguire believed it was more important to reinforce the practical level of communication he was learning with her staff. His attendance at her program would benefit him more than the proposed increased speech therapy would, as it would require him to be pulled out of her classroom for the speech therapy. Maguire opined that 240 minutes per month of group consult speech therapy would provide Student with appropriate support and educational benefit.

21. Ruiz testified at hearing regarding her observations of Student's progress during their speech therapy sessions. Ruiz earned a bachelor's degree in psychology from California State University at Northridge, in 1998. She earned a master's degree in communicative disorders, with an emphasis in speech and language pathology, from California State University at Los Angeles, in 1998. Ruiz was licensed as a speech and language pathologist by the State of California, and was certificated by the American Speech and Hearing Association. Ruiz had 10 years experience as a District speech pathologist, and three years as a Kaiser Permanente speech pathologist.

22. Ruiz explained that speech and language was a process involving global development. Ruiz explained that the language acquisition process involved thoughts, ideas, words, and speech and sound articulation. A child will progress at his own rate of global development. Ruiz opined that Student was in the early developmental stage of speech

production, and opined that providing more therapy time would not necessarily accelerate Student's overall global development which was needed to support speech development.

23. Ruiz believed District's offer of 240 minutes per month of speech and language services, as well as placement in the language-based autism class, was appropriate. Ruiz explained she recommended an increase in his services to 240 minutes per month of direct collaborative services because Student now paid more attention to adult-directed activities, instead of his own self-directed interests, which meant that increased speech therapy could help him. Student was progressing and understanding many concepts which correspondingly improved his speech, and was responding to more communication attempts.

24. Ruiz agreed that Student could benefit from both individual and group speech therapy. However, Student benefited more in the area of communication and pragmatics when he was in session with another child. Ruiz believed Student was stimulated by his peers, and that he could listen and learn from another peer in his group. In addition, the group session helped him to take turns, share, talk, pay attention, focus, and make good eye contact. Ruiz opined that Student did not require individual speech therapy, because Student appeared engaged and not distracted in group sessions. As a rule, Ruiz generally recommended individual speech therapy when a child either distracted other children or was distracted by other children. In addition, Ruiz believed that students encountered more difficulty generalizing concepts in individual sessions than in group settings. Therefore, Ruiz believed that her direct collaborative model would best suit his needs.

25. Ruiz credibly opined that Student did not meet his February 2010 IEP speech goals, because those initial goals were too complex for him. In addition, Student's three month delay in starting school contributed to Student's delay in reaching his goals. As such, the IEP team appropriately adjusted Student's goals at the February 2011 IEP.

LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of proof on all issues. (See *Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Student contends that District did not provide Student a FAPE in his February 3, 2011 IEP, because it did not offer Student three hours per week of individual speech and language services. Student alleges that Student's failure to meet his 2010 IEP speech and language goals dictates the three hours per week of related speech services. District disagrees, and contends it provided Student a FAPE when it offered a language-based autism special day program for 1000 minutes per week, and 240 minutes per month of group consult speech and language services.

3. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA). (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) A FAPE means special education and related services that are available to the

student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).) The term "related services" (in California, "designated instruction and services"), includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

4. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. The FAPE requirement of the IDEA is met when a child receives access to an education that is reasonably calculated to confer some educational benefit upon the child. (*Id.* at pp. 200, 203-204.)

5. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204, 207; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.)

6. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment (LRE). (*Id.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education*, (3rd Cir. 1993) 993 F.2d 1031, 1041.)

7. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School District* (S.D. Calif. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

8. Here, Student failed to establish by a preponderance of the evidence that District denied him a FAPE by not offering him three hours of individual speech and language services per week. Student neither submitted any credible evidence nor presented any expert testimony to support his contention that he required three hours of individual therapy per week to obtain educational benefit. In addition, the evidence established that when Student received speech and language services 90 minutes per month, he made progress, although he did not meet his speech and language goals. Ruiz credibly testified that, as a result, District appropriately modified Student's goals in the February 3, 2011 IEP. In addition, based on her recommendation, District increased Student's speech therapy services to 240 minutes per month of direct collaborative services, which included group therapy and classroom teacher collaboration. According to Ruiz's credible testimony, Student was ready for increased services. Specifically, Ruiz's recommendation was based on her direct observations of Student, a consultation with his teacher, a review of his level of language development and progress, a review of his global development and growth, and the fact that 240 minutes was commensurate with Student's developmental level. Ruiz and Maguire persuasively testified that Student benefitted more from the small group setting. Specifically, Ruiz presented uncontroverted testimony that Student made good progress with his peers, that he was engaged and not distracted during group sessions, and that group sessions could help Student generalize concepts and social pragmatics more readily than in individual sessions. As such, Student did not require individual speech therapy or speech therapy beyond 240 minutes per month to receive an educational benefit.

9. Student alleges that District did not offer him a FAPE with its offer of 240 minutes per month, because Student did not meet his speech goals with 90 minutes per month of speech therapy. However, the fact that Student did not meet all his initial 2010 IEP goals does not mean that District's offer was not appropriate. The law provides that a student may derive educational benefit even if some of his goals and objectives are not fully met. Here, Student derived educational benefit because he made progress toward his goals and objectives, even though he did not meet the goals. The record established that the initial 2010 IEP speech and language goals were too complex for Student to attain. Moreover, Student's delay in enrolling in the program by three months caused Student to make slower progress. Finally, the District's proposed increase of Student's group consult speech therapy was consistent and commensurate with Student's increased global development.

10. Based on the foregoing, Student has failed to establish by a preponderance of the evidence that District denied him a FAPE by not offering him three hours per week of individual speech and language services. (Factual Findings 1 through 25; Legal Conclusions 1 through 9).

ORDER

Student's request for relief is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on the sole issue presented.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety days of receipt.

Dated: November 1, 2011

/s/

DEBORAH MYERS-CREGAR
Administrative Law Judge
Office of Administrative Hearings